UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	
This Document Relates To:	
MARK NEWBY, *et al.*, individually and on behalf of all others similarly situated, Plaintiffs, vs. ENRON CORP., *et al.* Defendants.	Civil Action No. H-01-3624 (Consolidated)
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*, individually and on behalf of all others similarly situated, Plaintiffs, vs. KENNETH L. LAY, *et al.* Defendants.	

MOTION OF DEFENDANTS LEHMAN BROTHERS HOLDINGS INC. AND LEHMAN BROTHERS INC. TO DISMISS THE FIRST AMENDED CONSOLIDATED COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT

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INTRODUCTION

Following a careful analysis of plaintiffs' 500-page Consolidated Class Action Complaint ("Consolidated Complaint"), in which the Court properly rejected a "cookie cutter" approach to pleading scienter, the Court dismissed plaintiffs' Section 10(b)/Rule 10b-5 claim against defendant Lehman Brothers Holdings Inc. ("LBHI"). The Court held that, as to LBHI, plaintiffs failed to plead any facts that would give rise to a "strong inference of scienter," as required by the Private Securities Litigation Reform Act of 1995 (the "PSLRA") and Federal Rule of Civil Procedure 9(b). *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 703 (S.D. Tex. 2002).

In their First Amended Consolidated Complaint (the "Amended Complaint"), in addition to LBHI, plaintiffs have also named Lehman Brothers Inc. ("LBI") as a defendant. But plaintiffs' federal securities claims against LBI are time-barred under the one-year discovery prong of the applicable statutes of limitations because plaintiffs had actual knowledge of the alleged facts underlying their claims well over a year before they decided to add LBI as a defendant and were on inquiry notice of their claims even earlier than that. The claims against LBI do not relate back to the filing of the Consolidated Complaint because plaintiffs' failure to sue LBI before now was not a "mistake," but a tactical decision.

Even if plaintiffs' federal securities claims against LBI were not time-barred, plaintiffs have only insignificantly added to the "Lehman Brothers"-specific allegations that the Court previously found deficient. Indeed, despite an ample 648 pages in which to add some detail as to the alleged participation of any Lehman entity in Enron's fraudulent scheme, the only new allegations are that "Lehman Brothers" entered into an equity forward contract with Enron that plaintiffs mischaracterize as providing for "disguised loans" to Enron. Ignoring the deficiencies

that led to the dismissal of their original Section 10(b)/Rule 10b-5 claim, plaintiffs provide no specific facts in these new allegations to satisfy the element of scienter. To the contrary, plaintiffs have simply added more conclusory allegations to those made (and properly rejected) previously. Because a strong inference of scienter remains lacking, plaintiffs' Section 10(b)/Rule 10b-5 claim again must be dismissed.

Plaintiffs also have attempted to state a new claim under Section 12(a)(2) against LBI for alleged misstatements in the private "Offering Memoranda" for the August 17, 2000 private offering of $500,000,000 of 8% Enron Credit Linked Notes (the "Enron Credit Linked Notes") and the September 28, 2000 private offering by Osprey Trust, Osprey I, Inc. of $750,000,000 of 7.797% Senior Secured Notes and €315,000,000 of 6.375% Senior Secured Notes (collectively, the "Osprey II Notes"). In addition to being time-barred, the Section 12(a)(2) claim against LBI fails because no named plaintiff claims to have purchased the subject securities, much less from LBI, and because Section 12(a)(2) does not apply to private offerings of securities but only to public offerings made pursuant to a prospectus.

As for LBHI, it appears that plaintiffs' only claims against it are for secondary liability under Section 20(a) of the 1934 Act and Section 15 of the 1933 Act for LBI's alleged violation of Section 10(b)/Rule 10b-5 and Sections 11 and 12(a)(2). These "control person" claims against LBHI fail because the underlying claims against LBI fail and because plaintiffs do not sufficiently allege the exercise of control over LBI by LBHI.

Finally, the Washington State Investment Board (the "Washington Board") again purports to assert a claim under the Texas Securities Act against "Lehman Brothers." Notwithstanding this Court's prior orders making it clear that privity is a requirement for such a claim, the Amended Complaint nowhere alleges any facts demonstrating that the Washington

Board purchased any of the securities at issue from either LBI or LBHI. Moreover, plaintiffs offer no explanation of how LBHI can be liable under the Texas Securities Act if, as plaintiffs now admit, it did not act as an underwriter in connection with the July 7, 1998 offerings that are the subject of the Texas Securities Act claim. Because LBHI did not participate as an underwriter, it is not liable under the Act.

For all of these reasons, as discussed more fully below, the Amended Complaint should be dismissed with prejudice as to LBHI and LBI.

STATEMENT OF FACTS

Because plaintiffs' prior complaint failed to meet the applicable pleading standards, only that which is new in the Amended Complaint is material to the issue of whether plaintiffs have discharged their pleading burden. The new allegations against LBHI and LBI are sparse and conclusory. Indeed, the full extent of the new, "Lehman Brothers"-specific allegations are contained in two short paragraphs in the Amended Complaint, paragraphs 770.1 and 770.2.[1] There, plaintiffs allege that "Lehman Brothers" entered into a series of swap transactions with Enron on November 14, 2000 that were "structured through an equity forward contract" entered into on that same date. (Am. Cpl. ¶770.1.) Without a shred of support for their contention, plaintiffs broadly characterize this contract as providing for "disguised loans" to Enron totaling $170 million. (*Id.*) The Amended Complaint provides none of the actual terms and conditions of the alleged series of swap transactions but summarily proclaims them "similar to those executed through Mahonia and Delta." (*Id.*)

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[1] The addition of LBI as a defendant does nothing to address the lack of specificity in the Consolidated Complaint and, in any event, comes too late.

The only other new allegations in the Amended Complaint that touch at all upon either of the Lehman defendants are those regarding two private offerings of securities in which LBI allegedly was involved as an "underwriter/initial purchaser": the Enron Credit Linked Notes and the Osprey II Notes private offerings. (Am. Cpl. ¶¶ 108(b), 641.2.)[2] It is upon these private offerings that plaintiffs attempt to base their Section 12(a)(2) claim against LBI.

ARGUMENT

I. Plaintiffs' Federal Securities Claims Against LBI Are Time-Barred.

A. Plaintiffs Had Actual Knowledge Of The Alleged Facts Underlying Their Claims Against LBI More Than One Year Before Adding LBI As Defendant.

Plaintiffs now assert claims under Section 10(b)/Rule 10b-5 and Sections 11 and 12(a)(2) against LBI. These claims had to be brought within one year of when plaintiffs knew or should have known of the alleged wrongful conduct underlying the claims, but in no event more than three years after the alleged violation occurred. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359-60 (1991) (establishing statute of limitations for actions alleging a violation of Section 10(b)/Rule 10b-5); *Topalian v. Ehrman*, 954 F.2d 1134-1135 (5th Cir. 1992) (discussing one-year/three-year statute of limitations and repose for claims under Section 10(b) and the 1933 Act); 15 U.S.C. § 77m (establishing statute of limitations for civil actions brought for violations of the 1933 Act).[3] The one-year discovery prong of the statute of limitations

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[2] The Osprey II offering also was referenced in the Consolidated Complaint. (Cons. Cpl. ¶ 766.)

[3] This Court already has determined that the newly-imposed statute of limitations found in the Public Company Accounting Reform and Investor Protection Act 2002 ("Sarbanes-Oxley"), Pub. L. No. 107-204 § 804(b), 116 Stat. 745 (2002), does not apply to this action, as this is not a "proceeding commenced on or after July 30, 2002," the effective date of that Act. *See In re Enron Sec., Derivative & ERISA Litig.*, No. H-01-3624, 2003 WL 1089307, at *12 & n.20 (S.D. Tex. Mar. 12, 2003). In addition, Sarbanes-Oxley says nothing about reviving stale claims, such as plaintiffs' Section 11 claim arising from the May 19, 1999 offering of 7.375%

begins to run when the aggrieved party either has: (i) actual knowledge of the facts giving rise to the violation; or (ii) notice of facts that, in the exercise of due diligence, would have led to actual knowledge. *See Romano v. Merrill Lynch, Pierce, Fenner & Smith*, 834 F.2d 523, 528 (5th Cir. 1987). For the statute of limitations clock to start running, plaintiff need only know "of the facts forming the basis of his cause of action"; a plaintiff is not required to know "of the existence of the cause of action itself." *Hallman v. Northwestern Nat'l Ins. Co.*, 766 F. Supp. 575, 579 (S.D. Tex. 1991) (quoting *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988)).

There is no dispute that, at least by April 8, 2002, plaintiffs had actual knowledge of the facts forming the basis of their causes of action against LBI because they alleged those very facts in the Consolidated Complaint filed on that date.[4] Nevertheless, plaintiffs waited until May 14,

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Enron Notes, which expired on May 19, 2002 (prior to the passage of Sarbanes-Oxley) under the statute of repose in force at the time. Moreover, Sarbanes-Oxley purports to govern only those claims of "fraud, deceit, manipulation, or contrivance...." *See* Pub. L. No. 107-204 § 804, 116 Stat. 745 (2002). The Amended Complaint, however, makes clear that the claims under Sections 11 and 12(a)(2) against LBI are grounded in negligence, not fraud. (Am. Cpl. ¶¶ 1005, 1016.3.)

[4] Plaintiffs were on inquiry notice even before that date. Plaintiffs admit that Enron "shocked the markets" on October 16, 2001 "with revelations of $1.0 billion in charges and a reduction of shareholders' equity by $1.2 billion," and that "within days ... the SEC announced an investigation of Enron, and Fastow, Enron's Chief Financial Officer, resigned" (Am. Cpl. ¶ 61), which was followed by Enron's "huge" restatement of financial results in November 2001 (Am. Cpl. ¶ 63), and Enron's subsequent filing on December 2, 2001 of "the largest bankruptcy in history," (Am. Cpl. ¶ 66), which brought further public notice to its financial problems. These "storm warnings" were more than sufficient to put plaintiffs on inquiry notice of their claims against LBI in the Fall of 2001. *See, e.g., Jensen*, 841 F.2d at 607 (an investor is not permitted a "leisurely discovery of the full details of an alleged scheme," nor is an investor "free to ignore 'storm warnings' which would alert a reasonable investor to the possibility of fraudulent statements or omissions in his securities transaction"); *Westchester Corp. v. Peat, Marwick, Mitchell & Co.*, 626 F.2d 1212, 1217-18 (5th Cir. 1980) (plaintiffs had a duty to investigate when auditors had withdrawn financial statement certification, had asked to withdraw from the audit unless released from liability, had been dismissed, and two lawsuits had been filed alleging fraudulent financial statements); *Del Sontro v. Cendant Corp., Inc.*, 223 F. Supp. 2d 563, 573 (D.N.J. 2002) (corporation's public announcement of accounting irregularities was sufficient to put shareholders on inquiry notice of Section 10(b) claims and to commence one-year statute of

2003, over a year after filing the Consolidated Complaint, to sue LBI. Accordingly, plaintiffs' federal securities claims against LBI are time-barred.[5]

B. Plaintiffs' Claims Against LBI Do Not Relate Back To The Filing Of The Consolidated Complaint.

Because plaintiffs' federal securities claims against LBI are time-barred, plaintiffs can avoid dismissal of those claims only if plaintiffs can establish that they "relate back" to the filing of the Consolidated Complaint against LBHI on April 8, 2002. Pursuant to Federal Rule of Civil Procedure 15(c), an amendment that adds a new party "relates back" to the date of the original complaint only if (1) the same transaction or occurrence is involved, (2) the new party has "received such notice of the institution of the action" that he will not be prejudiced by defending on the merits, *and* (3) the new party "knew or should have known that, *but for a mistake concerning the identity of the proper party*," the action would have been brought against him initially. Fed. R. Civ. P. 15(c) (emphasis added). All three factors must be satisfied. *See*

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limitations); *Rahr v. Grant Thornton LLP*, 142 F. Supp. 2d 793, 798 (N.D. Tex. 2000) (plaintiffs had inquiry notice of possible fraud by auditors when auditor represented that it followed GAAP but there were public allegations of improper accounting methods); *Reed v. Prudential Sec. Inc.*, 875 F. Supp. 1285 (S.D. Tex. 1995) (a sharp drop in the stock price may trigger inquiry notice), *aff'd*, 87 F.3d 1311 (5th Cir. 1996); *Hallman*, 766 F. Supp. at 580 ("one statement or the other had to have been false" when statements contradict offering memorandum assertions, so plaintiffs were on inquiry notice, which "is triggered by evidence of the possibility of fraud, not full exposition of the scam itself"). Indeed, the first complaint in this consolidated litigation was filed on October 22, 2001. Given these facts, the one-year discovery limitations period for claims against LBI began to run no later than October 22, 2001 and certainly no later than December 2, 2001, the day Enron filed for bankruptcy.

[5] Further, to the extent that any of plaintiffs' federal securities claims against LBI are based on alleged conduct that occurred prior to May 14, 2000 (*see, e.g.*, Am. Cpl. ¶ 765 (referencing May 1999 offering of $500 million of 7.375% Enron notes)), they are barred by the three-year statute of repose. *See Lampf*, 501 U.S. at 359-60 (holding that securities fraud actions must be instituted within three years of the alleged misrepresentation); 15 U.S.C. § 77m (same for 1933 Act claims).

Powers v. Graff, 148 F.3d 1223, 1226-27 (11th Cir. 1998) (holding that all Rule 15(c) factors, including "mistake," must be satisfied); *La.-Pac. Corp. v. Asarco, Inc.*, 5 F.3d 431, 434 (9th Cir. 1993) (same).

Nowhere in the Amended Complaint do plaintiffs allege that they made a "mistake concerning the identity of the proper [Lehman] party." To the contrary, far from claiming that they erroneously named LBHI in the Consolidated Complaint, plaintiffs continue to assert claims against LBHI in the Amended Complaint. Moreover, plaintiffs admitted in the Consolidated Complaint that the "banking and advisory services" at issue were not performed by LBHI, but by its subsidiaries, of which LBI is one. (Cons. Cpl. ¶ 108.) And the very documents upon which plaintiffs based their claims against LBHI demonstrate that it was LBI, not LBHI, that participated as an underwriter in the various Enron-related securities offerings and issued the various analyst reports at issue. (*See, e.g.*, Prospectus for May 19, 1999 offering of 7.375% Enron Notes, Prospectus for June 1, 2000 offering of 7.875% Enron Notes, and 10/24/01 LBI analyst report, copies of which are attached to the Affidavit of Hugh R. Whiting ("Whiting Aff.") as Exhs. A – C, respectively.)[6] Nevertheless, plaintiffs made a tactical decision to sue LBHI

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[6] The Court may review any documents that are referred to or quoted in the Amended Complaint or on which plaintiffs necessarily relied or based their allegations, whether or not the document is specifically referred to in the pleading. *See, e.g., Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 (5th Cir. 2002) (court may consider documents referenced in, even if not attached to, the complaint on motion to dismiss); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) (noting with approval cases in other circuits holding that documents attached to a defendant's motion to dismiss are considered part of the pleadings if they are referred to in the complaint and are central to plaintiff's claim); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (holding that a court may review any "document integral to or explicitly relied upon in the complaint" and that "[p]laintiffs cannot prevent a court from looking at the texts of the documents on which its [sic] claim is based by failing to attach or explicitly cite them") (citations, quotation marks omitted).

alone and defended that decision in opposition to LBHI's motion to dismiss the Consolidated Complaint. (*See* Lead Plaintiff's Opposition to LBHI's Motion To Dismiss the Consolidated Complaint ("Opp. to Mot. to Dismiss") at 3 n.6, 110-12 (engaging in lengthy discussion of collective knowledge, maintaining that "[t]he alleged fraudulent scheme involved *both* Lehman's investment banking *and* commercial operations, *i.e.*, it is not limited to the actions of Lehman's securities subsidiary).) Under these circumstances, plaintiffs' claims against LBI do not relate back to the filing of the Consolidated Complaint because there is no claim of "mistake." *See, e.g., Jacobsen v. Osbourne*, 133 F.3d 315, 320 (5th Cir. 1998) ("Rule 15(c) is meant to allow an amendment changing the name of a party to relate back to the original complaint only if the change is the result of an error, such as misnomer or misidentification") (citation, quotation omitted); *La.-Pac.*, 5 F.3d at 434 (no relation back where "[t]here was no mistake as to identity, but rather a conscious choice of whom to sue"); *Schach v. Ford Motor Co.*, 210 F.R.D. 522, 527 (M.D. Pa. 2002) (dismissing complaint on limitations grounds where "[p]laintiff has not alleged any mistake as to the identity of the proper party" and noting that the court is not obligated to assume plaintiff can prove facts not alleged); *Wells v. HBO & Co.*, 813 F. Supp. 1561, 1567 (N.D. Ga. 1992) ("Even the most liberal interpretation of 'mistake' cannot include a deliberate decision not to sue a party whose identity plaintiff knew from the outset."); *see also Nelson v. Adams USA, Inc.*, 529 U.S. 460, 467 n.1 (2000) (holding there to be no mistake where plaintiff knew of newly-added defendants' "role and existence and, until it moved to amend its pleading, chose to assert its claims ... only against" an original defendant); *Powers*, 148 F.3d at 1227 (no relation back because the plaintiff "not only knew [newly-added] defendants' identity, but also knew of a claim against [them]" but nonetheless "elected not to sue"); *Gridley v. Cunningham*, 550 F.2d 551, 553 (8th Cir. 1977) (denying attempt to add defendant where there was no mistake

as to identity of original defendant); *Duckworth v. Brunswick Corp.*, No. 700CV120R, 2001 WL 402234, at *2 (N.D. Tex. Apr. 17, 2001) (holding that the "goal of Rule 15(c)(3) is to allow parties to correct their mistakes, not to allow them an indefinite amount of time in which to discover who the proper parties actually are"); *Johnston v. Smith*, No. 1:95-CV-595-RCF, 1997 WL 584349, at *3 (N.D. Ga. June 10, 1997) (holding no relation back where plaintiff "knew of existence [of new defendants] and their potential participation").[7]

II. The Court Should Once Again Dismiss Plaintiffs' Section 10(b)/Rule 10b-5 Claim Because The Amended Complaint Fails To Add Any Particularized Facts That Give Rise To A Strong Inference Of Scienter.

In ruling on the motions of the "Secondary Actors" to dismiss the Consolidated Complaint, the Court held that "a complaint alleging that more than one defendant participated in a 'scheme' to defraud must allege a primary violation of § 10(b) by *each* defendant." *In re Enron*, 235 F. Supp. 2d at 591 (emphasis added). The Court elaborated further that secondary actors (i.e., lawyers, accountants and banks) may be liable for participating in a scheme to defraud only "if *all* the requirements for liability under Rule 10b-5 have been satisfied as to *each* secondary actor defendant and any additional heightened pleading requirements have been met."

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[7] In *Arachnid, Inc. v. Valley Recreation Products, Inc.*, No. 93 C 50282, 2001 WL 1664052, at *7 (N.D. Ill. Dec. 27, 2001), for example, the court held that a claim against a holding company did not relate back to the filing of the original complaint against its subsidiary and several other companies because plaintiff's failure to name the holding company did not involve a case of mistaken identity (i.e., plaintiff intended to sue the holding company but named the subsidiary). Instead, plaintiff's decision represented an attempt "to cast its net wider so as to end up with a defendant with assets," a strategic decision not protected by Rule 15. *Id.* The court thus dismissed the claims against the holding company as time-barred. *Id.* The same result should obtain here. *See also Lundy v. Adamar of N.J., Inc.*, 34 F.3d 1173, 1182-84 (3d Cir. 1994); *In re Xchange Inc. Sec. Litig.*, No. 00-10322-RWZ, 2002 WL 1969661, at *3-4 (D. Mass. Aug. 26, 2002); *Manney v. Monroe*, 151 F. Supp. 2d 976, 996-98 (N.D. Ill. 2001); *Morgan v. City of Calera*, No. 99-D-261-N, 2001 WL 799564, at *1-3 (M.D. Ala. July 5, 2001); *Gilmore v. State of California*, No. 93-20788 SW, 1995 WL 492625, at *3 (N.D. Cal. Aug. 10, 1995); *In re Syntex Corp. Sec. Litig.*, 855 F. Supp. 1086, 1099 (N.D. Cal. 1994).

Id. at 592 (emphasis added). "To survive a motion to dismiss," plaintiffs, among other things, "must plead specific facts with particularity giving rise to a 'strong inference' of scienter." *Id.* at 571-72; *see also* 15 U.S.C. § 78u-4(b)(2) (1997) ("with respect to *each* act or omission," the complaint must "state with particularity facts giving rise to a strong inference that the defendant acted" with scienter) (emphasis added).

The Court determined that the Consolidated Complaint's general and conclusory allegations that the Secondary Actors knew of Enron's fraud because they provided ordinary professional or financial services to Enron and interacted regularly with Enron's officers were insufficient to plead scienter:

> [W]ithout some particular facts about specific involvement of each Defendant in fraud that would alert a reasonable party to recognize its participation in a fraudulent scheme and indicate either actual knowledge or reckless disregard by that Defendant of the wrongdoing to misrepresent Enron's financial condition, such general allegations applied to every Defendant across the board are not sufficient by themselves to raise a strong inference of scienter.

In re Enron, 235 F. Supp. 2d at 694.[8] The Court indicated that it would address only "*party-specific, concrete factual allegations* against each Defendant whose motion to dismiss is under

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[8] *See also Nathenson v. Zonagen Inc.*, 267 F.3d 400, 412 (5th Cir. 2001) (motive and opportunity alone do not show scienter); *Melder v. Morris*, 27 F.3d 1097, 1104 (5th Cir. 1994) (describing as a "mockery of Rule 9(b)" the notion that providing financial services such as underwriting creates a motive for fraud); *Jett v. Sunderman*, 840 F.2d 1487, 1493 (9th Cir. 1988) (routine commercial financing transactions do not violate Section 10(b)); *Vogel v. Sands Bros. & Co.*, 126 F. Supp. 2d 730, 739 (S.D.N.Y. 2001) (holding that allegations of "desire to realize greater transaction fees and [underwriter's] close relationship with [issuer] are insufficient to show an improper motive"); *McNamara v. Bre-X Minerals Ltd.*, 57 F. Supp. 2d 396, 405 (E.D. Tex. 1999) ("Plaintiffs do not sufficiently allege motive by making generic allegations that the defendant had a financial interest in carrying out the alleged fraud.") (citation omitted); *Cogan v. Triad Am. Energy*, 944 F. Supp. 1325, 1328-31 (S.D. Tex. 1996) (an investor cannot state a claim based on lending to issuer); *Sloane Overseas Fund, Ltd. v. Sapiens Int'l Corp.*, 941 F. Supp. 1369, 1377 (S.D.N.Y. 1996) (the provision of offering manager and underwriter services could not support claim under Section 10(b)); *Interallianz Bank AG v. Nycal Corp.*, No. 93 CIV.

review to see if Lead Plaintiff has asserted with specificity some material misrepresentation or omission, use of a deceptive device or contrivance or participation in a scheme or course of business to defraud investors in connection with the purchase or sale of securities that would raise a strong inference of scienter, sufficient for Lead Plaintiff's § 10(b) claims to survive." *Id.* at 695 (emphasis added).

After examining the "Lehman Brothers"-specific allegations in the Consolidated Complaint, the Court found them deficient. *In re Enron*, 235 F. Supp. 2d at 703. The Court held that, "[u]nlike with respect to the other Defendants discussed thus far, the complaint fails to identify any specific act or material misstatement or omission or involvement in the alleged Ponzi scheme [by LBHI] that would give rise to a strong inference of scienter." *Id.* Accordingly, the Court dismissed plaintiffs' Section 10(b)/Rule 10b-5 claim as to LBHI.

Plaintiffs' new allegations do not rectify their deficient pleading of scienter. In fact, plaintiffs' new allegations are not really "new" at all. They are just more of the same type of allegations that the Court previously held to be inadequate. In the Consolidated Complaint, plaintiffs alleged that "Lehman Brothers engaged in transactions with Enron to disguise loans to Enron and *help* Enron falsify its true financial condition, liquidity and creditworthiness." (Cons. Cpl. ¶ 763 (emphasis added).) As LBHI showed in its prior motion to dismiss, the Consolidated Complaint lacked any specific facts to support this conclusory allegation. Plaintiffs not only failed to plead any such transactions with particularity, but they did not even identify such a transaction. Plaintiffs simply repeated the allegation verbatim for every bank defendant. The

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5024(RPP), 1994 WL 177745, at *8 n.7 (S.D.N.Y. May 6, 1994) (no Section 10(b) violation without allegation that lender went "beyond the normal conduct and interests of a lender").

Court correctly held that such conclusory allegations do not sufficiently plead scienter. *In re Enron*, 235 F. Supp. 2d at 687 ("[M]ore is needed than conclusory allegations to defeat a motion to dismiss....").

Plaintiffs' sole attempt to remedy their failure to plead scienter is to mischaracterize an equity forward contract entered into in November 2000 by Enron and "Lehman Brothers" as providing for "disguised loans":

> On or about 11/14/00, Lehman Brothers and Enron entered a series of prepaid swap transactions similar to those executed through Mahonia and Delta. The ISDA Master Agreement entered into by Lehman Brothers and Enron provided for approximately $170 million disguised loans to Enron, and likewise artificially inflated Enron's cash flow. The transactions were structured through an equity forward contract to conceal the true nature of their existence – debt.

(Am. Cpl. ¶ 770.1.)[9] Plaintiffs further allege that "[p]ursuant to this equity forward contract," "Lehman Brothers" purchased from Enron either Enron stock or rights to Enron stock, and that Enron agreed to buy back the stock at a later date for the same price plus a fee. (*Id.*) According to plaintiffs, the transactions were "the economic equivalent of loans collaterized with Enron stock." (*Id.*) These allegations are utterly inadequate for several reasons.[10]

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[9] The ISDA Master Agreement, which is a standard form agreement, is between Enron and Lehman Brothers Finance S.A. ("LBF"), which is not a defendant here. (A copy of the ISDA Master Agreement, which the Court may consider because it is referenced in the Amended Complaint, is attached to the Whiting Aff. as Ex. D.) Plaintiffs do not plead any basis to hold LBHI or LBI liable for LBF's conduct. For this reason alone, plaintiffs' Section 10(b)/Rule 10b-5 claim should be dismissed.

[10] In addition to this "series of prepaid swap transactions," plaintiffs add allegations regarding two more Enron-related securities offerings (one of which was identified in the Consolidated Complaint) in which LBI allegedly participated as an underwriter: the Enron Credit Linked Notes and Osprey II Notes private offerings. Like the Consolidated Complaint, the Amended Complaint asserts in blanket fashion that all statements in the offering documents for the offerings underwritten by LBI "are statements of Lehman Brothers as an underwriter." (Am. Cpl. ¶ 768 (emphasis omitted).) This Court has already rejected that contention, however,

A. Plaintiffs Provide No Details Whatsoever About The Alleged "Series Of Prepaid Swap Transactions."

Plaintiffs fail to provide any of the relevant factual details about the alleged "series of prepaid swap transactions" as required by Rule 9(b) and the PSLRA. *See Rosenzweig v. Azurix Corp.*, No. 02-20804, 2003 WL 21242319, at *9 (5th Cir. June 13, 2003); *Nathenson v. Zonagen*, 267 F.3d 400, 412 (5th Cir. 2001); *In re Enron*, 235 F. Supp. 2d at 570; *PFK Bus. Sys. v. www.ZipWorld.Com, Inc.*, No. 3:01-CV-1336-L, 2002 U.S. Dist. LEXIS 10235, at *17 (N.D. Tex. June 2, 2002). Not a single such transaction is identified, let alone are its terms and conditions disclosed. Plaintiffs do not allege the number of shares of stock allegedly purchased from Enron, the prices per share or total dollar amounts involved, or the relevant dates of any of the "series" of trades other than the November 14, 2000 date itself. Plaintiffs do not even specify whether LBF allegedly purchased "common stock (or a contract representing the rights to Enron common stock)" (Am. Cpl. ¶ 770.1 (emphasis omitted) choosing to leave even the very consideration at issue in vague, general terms. Nor do plaintiffs provide *any* of the details required by Rule 9(b) and the PSLRA about the alleged repurchase component of these purported trades, such as their terms.[11]

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holding that, under *Central Bank v. First Interstate Bank of Denver*, 511 U.S. 164 (1994), liability under Section 10(b) requires at least that the defendant have "writ[ten] misrepresentations for inclusion in a document to be given to investors, even if the idea for those misrepresentations came from someone else." *In re Enron*, 235 F. Supp. 2d at 693 (citation, quotation omitted). Because the Amended Complaint does not identify any misstatements written by LBI (or LBHI) for inclusion in the offering documents issued in connection with the newly-alleged private offerings in which LBI allegedly participated, those offerings add nothing to plaintiffs' deficient scienter allegations.

[11] Of course, it would not be the mere fact that the trades allegedly were made, but how Enron accounted for them, that allegedly would have defrauded investors. Although the allegations are too vague to tell, plaintiffs' theory may be that Enron booked revenue by selling equity for immediate cash but failed to disclose its future payment obligation "underlying that

B. There Is No Comparison Between The Alleged LBF Transactions And The Alleged Mahonia And Delta Transactions.

Hoping to hide the total absence of particularized facts behind broad brushstrokes and opaque mischaracterizations, plaintiffs make the conclusory allegation that the "series of prepaid swap" transactions were "similar to those executed through Mahonia and Delta." (Am. Cpl. ¶ 770.1.) But nothing in the Amended Complaint actually alleges any *facts* sufficient to make such a comparison. Plaintiffs' allegations regarding the Mahonia and Delta transactions are extremely detailed. (*See* Am. Cpl. ¶¶ 664, 665, 666, 668, 684.) As alleged in the Amended Complaint, they were complex transactions that involved specific terms and features. No such detail is or could be provided with respect to the LBF transactions.

For example, the Amended Complaint does not allege that the LBF trades were illegitimate. (*Compare* Am. Cpl. ¶¶ 770.1, 770.2 *with* Am. Cpl. ¶¶ 664, 665, 667, 668, 684.) It does not allege how the transactions were recorded in Enron's financial statements. (*Id.*) It does not allege that LBF received excessive fees or interest, or the amount of any such gains. (*Id.*) It does not allege that LBF insured or hedged its interest in the contracts through unusual means. (*Id.*) It does not allege that any offshore "paper companies" were set up for the purpose of effectuating the transactions. (*Id.*) In short, plaintiffs' *ipse dixit* comparisons to Mahonia and Delta cannot sweep the trades with LBF into the same category with those alleged transactions.

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cash flow" to repurchase the stock. (Am. Cpl. ¶ 770.1.) It is also possible that plaintiffs' theory is that Enron's future payment obligations were reflected in its financial statements but should have been categorized differently than they were. The Amended Complaint leaves these matters entirely to guesswork. If this is the theory, however, plaintiffs do not allege that Generally Accepted Accounting Principles ("GAAP") required different treatment, let alone identify any pertinent GAAP principles to support such a contention. In short, plaintiffs give no explanation of why the transactions should have been treated in Enron's financial statements as something other than what they (allegedly) were.

C. The Documents Relied On By Plaintiffs Do Not Support Their Characterization Of The Equity Forward Contract As Providing For "Disguised Loans."

Finally, plaintiffs' allegations of "disguised loans" are without support in the transaction documents on which plaintiffs rely. Plaintiffs' allegation that "[t]he ISDA Master Agreement entered by Lehman Brothers and Enron provided for approximately $170 million in disguised loans to Enron" (Am. Cpl. ¶ 770.1), is absolutely false. A review of the document shows that the ISDA Master Agreement itself does not in fact provide for any loans at all, "disguised" or otherwise. (*See* Whiting Aff. Ex. D.) It makes no reference to the $170 million amount that plaintiffs say it provided to be loaned to Enron – or to any other dollar amount. Nor does the agreement provide for any transaction in which LBF would purchase shares of Enron stock from Enron and then sell those shares back to Enron at a later date. Indeed, the Master Agreement does not itself set forth the terms and conditions of any specific trades; it only provides general terms that were to apply to transactions between Enron and LBF.[12]

Plaintiffs also quote (without identifying the source) (Am. Cpl. ¶ 770.2), a November 1, 2001 agreement between LBF and Enron as supposed confirmation that Enron was indebted to

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[12] The specific terms and conditions of the transactions between LBF and Enron are contained in the confirmations of the trades executed by the parties, which, by the terms of the Master Agreement itself, form a part of that agreement. (*See* Whiting Aff. Ex. D, Master Agreement at 1.) The confirmations directly refute plaintiffs' fundamental allegations that "Lehman Brothers" made "disguised loans" to Enron. For example, the initial trade confirmation between LBF and Enron dated November 14, 2000, the very date on which plaintiffs allege the series of trades began, reflects only an equity forward contract in which Enron agrees to buy, at a future date, a specified number of shares of its stock from LBF for a price set under the terms contained in the confirmation. (A copy of the trade confirmation is attached to the Whiting Aff. as Ex. E.) This confirmation *nowhere* provides that LBF (or any other Lehman-related entity) would purchase stock from Enron, or would pay any cash to Enron, either initially or at a later time. It only provided Enron the ability to purchase its shares in the future at a specified price. Given that plaintiffs have had access to the documents provided by Enron and were able to locate the ISDA Master Agreement, plaintiffs should have located and reviewed the trade confirmations before making their baseless allegations.

LBF for the repurchase of stock originally purchased by LBF from Enron. (A copy of the agreement is attached to the Whiting Aff. as Ex. F.) Like the ISDA Master Agreement, however, the November 2001 agreement nowhere suggests that LBF ever purchased stock from Enron or paid it any cash.

In sum, plaintiffs' "disguised loans" allegations in the Amended Complaint are every bit as deficient as plaintiffs' "disguised loans" allegations in the Consolidated Complaint. Plaintiffs have added no new factual allegations that give rise to a strong inference of scienter. For the same reasons that the Court found scienter lacking in the Consolidated Complaint, it is lacking in the Amended Complaint as well. Accordingly, the Court should again dismiss plaintiffs' Section 10(b)/Rule 10b-5 claim.

III. Plaintiffs Have Failed To State A Claim Against LBI For Violation Of Section 12(a)(2).

A. Plaintiffs Lack Standing To Bring A Claim Under Section 12(a)(2) Against LBI Because No Plaintiff Claims To Have Purchased Any Enron Credit Linked Notes Or Osprey II Notes.

In their Fourth Cause of Action, plaintiffs purport to assert a claim under Section 12(a)(2) of the 1933 Act against LBI based upon alleged misrepresentations in the Private Offering Memoranda for the Enron Credit Linked Notes and the Osprey II Notes. (*See* Am. Cpl. ¶ 1016.4.) To have standing to bring a claim under Section 12(a)(2), a plaintiff must have purchased the security that is the subject of that claim. *See* 15 U.S.C § 77l(a) (Section 12(a)(2)'s protection extends only to "the persons purchasing such security from [the seller]"); *7547 Corp. v. Parker & Parsley Dev. Partners, L.P.*, 38 F.3d 211, 225 (5th Cir. 1994) ("standing to sue under the private right of action afforded by [Section 12(2)] is based upon the requirement that the plaintiff be a 'purchaser' of the security at issue"); *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1114 (5th Cir. 1988) (liability under Section 12(a)(2) hinges on a passing of title from seller to

buyer), *vacated on other grounds sub nom., Fryar v. Abell*, 492 U.S. 914 (1989); *Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 517 (5th Cir. 1985) (Section 12 "by [its] very terms impose[s] liability on any person who 'offers or sells' a security by fraudulent means, *but [its] protection extends only to purchasers.*") (emphasis added); *In re Paracelsus Corp. Sec. Litig.*, 6 F. Supp. 2d 626, 631 (S.D. Tex. 1998) (dismissing Section 12(a)(2) claims because "plaintiffs ... do not allege that any named plaintiff purchased or acquired any of the notes at issue"). Thus, to have standing to maintain their Section 12(a)(2) claim against LBI, plaintiffs must have purchased the Enron Credit Linked Notes and the Osprey II Notes.[13]

Plaintiffs attempt to demonstrate their standing by indiscriminately alleging that "the defendants in this Claim for Relief sold the Foreign Debt Securities to plaintiffs *and/or* Class members," and that "[p]laintiffs *or* members of the Class purchased" the securities. (Am. Cpl. ¶¶ 1016.4, 1016.5 (emphasis added).) No plaintiff, however, alleges that it actually purchased any of either the Enron Credit Linked Notes or the Osprey II Notes, much less from LBI.[14] To

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[13] It is irrelevant that this action is styled as a class action and plaintiffs purport to represent those in the class who might have purchased these securities. "The fact that a case is brought as a class action does not change the [standing] calculus; named plaintiffs 'cannot represent a class of whom they are not a part.'" *Haft v. Eastland Fin. Corp.*, 772 F. Supp. 1315, 1316 (D.R.I. 1991) (quoting *Harris v. McRae*, 448 U.S. 297, 320 n.12 (1980)). *See also In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518, 522 (5th Cir. 1995) ("It is well-established that to have standing to sue as a class representative it is essential that a plaintiff must be part of that class....") (quotations, alterations omitted); *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981) (holding that named plaintiffs in class action lack standing to sue for injuries to a purported class where named plaintiffs "failed to make even the threshold showing that they suffered the particular injury [forming the basis for their claims]"). "Inclusion of class action allegations in a complaint does not relieve a plaintiff of himself meeting the requirements of constitutional standing.... Standing cannot be acquired through the back door of a class action." *Gabrielsen v. BancTexas Group, Inc.*, 675 F. Supp. 367, 371 n.3 (N.D. Tex. 1987).

[14] Not only must the plaintiff be a purchaser, but the defendant must have been the seller. *See, e.g., Pinter v. Dahl*, 486 U.S. 622, 644 n.21 (1988) (Section 12 imposes liability only on the buyer's immediate seller); *Rosenzweig*, 2003 WL 21242319, at *14 ("To count as 'solicitation,' the seller must, at a minimum, directly communicate with the buyer."); *Lone Star*

the contrary, the Amended Complaint appears to concede that no plaintiff purchased any of those securities by omitting those securities from the lists of securities purchases made by the respective named plaintiffs. (*See id.* ¶¶ 80-81 (identifying named plaintiffs and the securities purchased by each); Am. Cpl. Appendix Ex. D; Lead Plaintiff's Appendix of Certifications in Support of Cons. Cpl., filed Apr. 8, 2002; *see also* Lead Plaintiff's Am. Mot. for Class Certification, filed May 28, 2003, at 19-24 (identifying purchases of plaintiffs and purported class representatives).) Thus, plaintiffs' Section 12(a)(2) claim must be dismissed as to LBI for lack of standing.

B. Section 12(a)(2) Applies Only To Public Offerings.

Section 12(a)(2) creates liability only "against sellers who make material misstatements or omissions 'by means of a prospectus.'" *Gustafson v. Alloyd Co.*, 513 U.S. 561, 564 (1995). After considering the nature of a "prospectus," the Supreme Court held that in order for Section 12(a)(2) to apply, the offering must be a public one: "[t]he intent of Congress and the design of the statute requires that [Section 12(a)(2)] liability be limited to public offerings." *Id.* at 578. *See also id.* at 581 ("The House Report thus states with clarity and specific reference to § 12 that § 12 liability is imposed only as to documents soliciting the public."). Following *Gustafson*, courts uniformly have held that Section 12(a)(2) does not apply to a private offering of securities. *See, e.g., Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001); *Moskowitz v. Micham Indus.*, No. 9801244, 1999 WL 33606197, at *19 (S.D. Tex. Sept. 29, 1999). Likewise, courts have held

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Ladies Inv. Club v. Schlotzsky's Inc., 238 F.3d 363, 370-71 (5th Cir. 2001) (requiring plaintiffs to show direct sale or solicitation to avoid dismissal); *Cyrak v. Lemon*, 919 F.2d 320, 324-25 (5th Cir. 1990) (Section 12(a)(2) claim may only be asserted against a defendant "who passed title to plaintiff or solicited the transaction in which title passed").

that private placement memoranda are not prospectuses for the purposes of a claim under Section 12(a)(2) because they do not "solicit the public." *In re Azurix Corp. Sec. Litig.*, 198 F. Supp. 2d 862, 893 (S.D. Tex. 2002) (citing *Lewis*, 252 F.3d at 357) aff'd, 2003 WL 21242319 (5th Cir. June 13, 2003). *See also Glamorgan Coal Corp. v. Rather's Group PLC*, No. 93 CIV 7581, 1995 WL 406167, at *3 (S.D.N.Y. July 10, 1995) (dismissing Section 12(a)(2) causes of action because the private placement memorandum did not have to comply with Section 10 requirements and therefore Section 12 did not apply).[15]

The private "Offering Memoranda" for the Enron Credit Linked Notes and the Osprey II Notes make clear that those "Foreign Debt Securities" were not registered under the 1933 Act and were not sold in a public offering, but were privately placed with "Qualified Institutional Buyers."[16] Accordingly, the private Offering Memoranda are not prospectuses for purposes of

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[15] This is especially so where the private placement memorandum: (1) repeatedly explains that the offering is private and only available to qualified purchasers; (2) clearly states that the memorandum is to be used on a confidential basis and only by the recipient of the memorandum; and (3) explicitly declares that the securities being offered are not registered. *See Kainos Labs., Inc. v. Beacon Diagnostics, Inc.*, No. C-97-4618, 1998 WL 2016634, at *4-5 (N.D. Cal. Sept. 14, 1998); *ESI Montgomery County, Inc. v. Montenay Int'l Corp.*, 899 F. Supp. 1061, 1065 (S.D.N.Y. 1995).

[16] Each of the Private Offering Memoranda for the Enron Credit Linked Notes and the Osprey II Notes states that it "is confidential," "is personal to each offeree," and "does not constitute an offer to any other person or to the public generally." (*See* Whiting Aff. Exhs. G & H.) Moreover, both Offering Memoranda include a statement on their covers and again in the "Notice to Investors" to the effect of: "The [Notes] have not been and will not be registered under the Securities Act of 1933 ... or any state securities laws and may not be offered or sold except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the Securities Act.... The [Notes] are being offered hereby only (a) to 'Qualified Institutional Buyers' (as defined in Rule 144A under the Securities Act...) in reliance on the exemption from the registration requirements of the Securities Act provided by Rule 144A and (b) outside the United States to certain persons in reliance upon Regulation S under the Securities Act." (*Id.*) Rule 144A offerings are private transactions that "are not subject to the registration provisions of the Securities Act," Securities Act Release No. 6862 [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,523 at 80,639 (Apr. 23, 1990), because they are "intended to cover only resales to institutions that are sophisticated securities investors." *Id.* at

Section 12(a)(2) and any alleged misrepresentations in those documents are not actionable under that statute. For this reason also, plaintiffs' Section 12(a)(2) claim should be dismissed as to LBI.[17]

IV. LBHI Is Not Liable As A Control Person Under Sections 20(a) or 15.

A. There Is No Primary Violation For Which LBHI Can Be Derivatively Liable.

Plaintiffs assert claims against LBHI for control person liability under Section 20(a) of the 1934 Act and Section 15 of the 1933 Act for LBI's alleged federal securities law violations.[18] Control person liability under Sections 20(a) and 15 requires an underlying violation of the federal securities laws. *See ABC Arbitrage v. Tchuruk*, 291 F.3d 336, 362 n.123 (5th Cir. 2002) ("Plaintiffs' section 20(a) control-person liability claims ... were also properly dismissed based on Plaintiffs' failure to plead predicate securities fraud claims under section 10(b) and Rule 10b-5 ... upon which relief can be granted."); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1021 n.8 (5th Cir. 1996) (same); *Rubinstein v. Collins*, 20 F.3d 160, 166 n.15 (5th Cir. 1994) ("'Control person' liability is, however, derivative, i.e., such liability is predicated on the

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80,641. *See also In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 431-32 (S.D.N.Y. 2001).

[17] Plaintiffs' conclusory allegation that the Foreign Debt Securities were "publicly traded" on the Luxembourg Exchange (*see* Am. Cpl. ¶¶ 641.17, 641.21) does not salvage their Section 12(a)(2) claim. Under *Gustafson*, it is irrelevant that securities are publicly traded subsequent to their initial offering; the initial offering itself must be public and pursuant to a "prospectus" in order for Section 12(a)(2) to apply. *See* 513 U.S. at 575, 578.

[18] Plaintiffs' allegations of control are inconsistent. First, plaintiffs claim that LBHI is controlled by LBI, then plaintiffs claim the opposite, claiming that LBHI controls LBI. (*Compare* Am. Cpl. ¶ 108(a) ("[LBHI] is a large integrated financial services institution that through known and unknown subsidiaries, divisions, and/or affiliates acting as the agent of and under the control of [LBI]...") *with* ¶ 108(b) ("[LBI] – under the control of [LBHI]...").) Because plaintiffs allege the latter more often and name only LBHI in their claim for control person liability, it is assumed for the purposes of this motion that LBI is not alleged to have controlled LBHI.

existence of an independent violation of the securities laws."); *In re Enron*, 235 F. Supp. 2d at 598 ("Because a primary violation of § 11 is a necessary element of a § 15 claim, if a plaintiff fails to state a claim for a primary violation, he has also failed to state a claim under § 15.").[19] As demonstrated above, plaintiffs have failed to plead a claim for primary liability under Section 10(b)/Rule 10b-5, Section 11 or Section 12(a)(2) against LBI, the entity that plaintiffs allege LBHI controlled. Having no federal securities claims against LBI for primary liability, plaintiffs have no claims against LBHI for control person liability.

B. Plaintiffs Have Not Pled Control Person Liability Adequately.

As this Court has previously held, "[t]o survive a motion to dismiss a claim for controlling person liability under Section 15 of the 1933 Act, a plaintiff must allege ... *particularized facts* as to the controlling person's culpable participation in (exercising control over) the fraud perpetuated by the controlled person." *In re Enron*, 235 F. Supp. 2d at 598 (emphasis added) (quoting *Ellison v. Am. Image Motor Co.*, 36 F. Supp. 2d 628, 637-38 (S.D.N.Y. 1999)). *See also Collmer v. U.S. Liquids, Inc.*, No. H-99-2785, 2001 U.S. Dist. LEXIS 23518, at *10 n.7 (S.D. Tex. Jan. 23, 2001) (same). "[D]ismissal is appropriate where the plaintiff fails to plead any facts from which it can reasonably be inferred that the particular defendant was a control person." *In re Enron*, 235 F. Supp. 2d at 598. *See also Collmer*, 2001 U.S. Dist. LEXIS at 23518, at *10 n.7.[20]

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[19] "Although worded in different ways, the control person liability provisions of § 15 of the 1933 Act and § 20(a) of the 1934 Act are interpreted the same way." *Collmer*, 2001 U.S. Dist. LEXIS 23518, at *14 n.11. *See also In re Sec. Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 867 n.17 (S.D. Tex. 2001) (same).

[20] In two subsequent opinions in this case the Court determined that a plaintiff may state a claim for control person liability by alleging that "the controlling person had the power to control the controlled person or to influence corporate policy," and that the actual exercise of such control and culpable participation in the purported fraud need not be alleged. *See In re*

Plaintiffs do not plead direction or control over management or policies through voting securities, by contract, interlocking directors, or any of the other means that would be sufficient to state a control person liability claim. *See Collmer*, 2001 U.S. Dist. LEXIS 23518, at *10 n.7 ("Control can be established by demonstrating that the defendant possessed the power to direct or cause the direction of the management and policies of a person through ownership of voting securities, by contract, business relationships, interlocking directors, family relations ships [sic], and the power to influence and control the activities of another."). Plaintiffs rely instead on generalized statements that LBHI controlled LBI. (Am. Cpl. ¶¶ 995.1, 1013, 1016.2 ("Defendants ... [LBHI] controlled each of their respective subsidiaries and affiliates.").) Plaintiffs do not say how this occurred or how such control manifest itself in the actions in which LBI is alleged to have engaged regarding Enron. This Court has already rejected similar conclusory allegations lodged against other defendants. *In re Enron Corp.*, 2003 WL 230688, at *2, 5, 16, 20 (dismissing control person liability claims against certain individual Andersen defendants). For this reason also, plaintiffs' claims against LBHI under Sections 20(a) and 15 should be dismissed.

V. Plaintiffs' Texas Securities Act Claim Should Be Dismissed Because The Amended Complaint Does Not Allege That The Washington Board Purchased Securities From Either LBI Or LBHI.

In the Fifth Cause of Action, plaintiff Washington Board purports to assert a claim under article 581-33A(2) of the Texas Securities Act against "Lehman Brothers" arising out of the July 7, 1998 offerings of 6.4% and 6.95% Enron Notes. This Court has ruled that, to state a

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Enron Corp., 2003 WL 1089307, at *49; *In re Enron Corp.*, 2003 WL 230688, at *11. The standard set forth by this Court in its December 20, 2002 Memorandum and Order is the correct one and is the one the court should follow in ruling on this motion to dismiss.

claim for violation of that article of the Texas Securities Act, plaintiffs must allege facts demonstrating that the Washington Board was in privity with the purported violators of the Act. *See In re Enron Corp.*, 2003 WL 1089307, at *12, 49-50 & n.70 ("Lead Plaintiff *may* be able to allege that [certain bank defendants] were in privity with and actively solicited the sale of securities to the Washington Board") (emphasis added). As this Court properly recognized, seller liability under article 581-33(A)(2) only arises when a plaintiff is in privity with the defendant, "i.e., the plaintiff must have bought his securities from the defendant whom the plaintiff is suing." *Id.* at *14-16. *See also Rosenzweig*, 2003 WL 21242319, at *14; *Akin v. Q-L Invs., Inc.*, 959 F.2d 521, 532 (5th Cir. 1992). Although the Amended Complaint asserts in conclusory fashion that "JP Morgan and Lehman Brothers" were in privity with the Washington Board (Am. Cpl. ¶ 1016.15), it fails to allege any *facts* demonstrating that the Washington Board "bought" from either LBI or LBHI.[21] Plaintiffs' Texas Securities Act claim thus fails as to both entities.[22]

CONCLUSION

For all of the foregoing reasons, this Court should dismiss the Amended Complaint with prejudice as to defendants LBHI and LBI.

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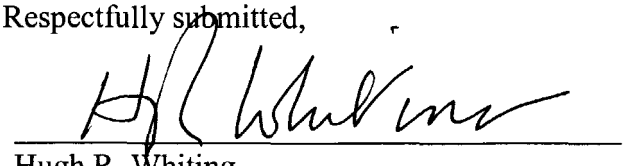
[21] Tellingly, the Washington Board does not identify the "seller" of the securities at issue in its Certification. (*See* Lead Plaintiff's Appendix of Certifications in Support of Consolidated Complaint.)

[22] Plaintiffs' claim is particularly deficient as to LBHI given that plaintiffs now admit that LBI, not LBHI, was the Lehman entity that participated as an underwriter in connection with the two July 7, 1998 offerings that are the subject of plaintiffs' Texas Securities Act claim. (*See* Am. Cpl. ¶ 108(b).)

June 18, 2002

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served on the attorneys of record for all parties to the above cause through esl3624.com in accordance with the Court's order regarding website service on the 18th day of June, 2003.